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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON
AT YAKIMA

ENRIQUE JEVONS, as managing member of Jevons Properties LLC, et al.,

Plaintiffs,

v.

JAY INSLEE, in his official capacity of the Governor of the State of Washington, et al.

Defendants.

NO. 1:20-cv-03182-SAB

DEFENDANTS' REPLY BRIEF IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT

NOTED FOR: August 5, 2021 at 1:30 pm

With Oral Argument

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I. INTRODUCTION

The Governor placed a moratorium on certain evictions to mitigate the health and economic impacts of COVID-19 on Washington residents. Limiting evictions has slowed the spread of COVID-19, reduced housing instability, and saved lives. Renters protected by Proclamation 20-19.6 (the Moratorium) have been able to stay home and adhere to public health guidelines. And the Moratorium has—during a time of immense economic fragility and hardship—protected renters from homelessness or from moving into shared or congregate living spaces, where the risk of COVID-19 transmission is high.

The Landlords' Opposition to the State's Cross-Motion for Summary Judgment distorts the governing law, mischaracterizes the Moratorium, and fails to establish a genuine dispute of material fact as to any of their claims. The Moratorium invalidates no leases, discharges no tenants' debts, appropriates no property, and merely regulates the landlord-tenant relationship. As a sister court held, the Moratorium is a "reasonable and appropriate" strategy to "address vital public interests during a national public crisis." *El Papel LLC v. Inslee*, No. 2:20-CV-01323-RAJ-JRC, 2020 WL 8024348, at *12 (W.D. Wash. Dec. 2, 2020), *report and recommendation adopted*, 2021 WL 71678 (Jan. 8, 2021). The Court should grant summary judgment in favor of the State on the Landlords' Contracts Clause, Takings Clause, and Due Process Clause claims. This outcome would be in accord with numerous federal courts across the country that have denied property owners relief from state and local evictions moratoria with the same or similar constitutional

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claims. *See Heights Apts., LLC v. Walz*, No. 20-CV-2051 (NEB/BRT), 2020 WL 7828818 (D. Minn. Dec. 31, 2020); *Apt. Ass'n of Los Angeles Cnty. v. City of Los Angeles*, 500 F. Supp. 3d 1088 (C.D. Cal. 2020); *Baptiste v. Kennealy*, 490 F. Supp. 3d 353 (D. Mass 2020); *HAPCO v. City of Philadelphia*, 482 F. Supp. 3d 337 (E.D. Pa. 2020); *Auracle Homes, LLC v. Lamont*, 478 F. Supp. 3d 199 (D. Conn. 2020); *Elmsford Apt. Assocs., LLC v. Cuomo*, 469 F. Supp. 3d 148 (S.D.N.Y. 2020). It would also be consistent with the Thurston County Superior Court's recent order granting summary judgment in favor of the State on all claims, including claims under the Washington State Constitution's parallel Takings and Contracts Clauses. *See* Second Declaration of Cristina Sepe, Exs. N, O.

II. ARGUMENT

A. Jurisdictional Bars Foreclose the Landlords' Claims[1]

1. The Landlords lack standing

The CDC moratorium—which is currently in effect—remains an obstacle to the Landlords "establishing traceability and redressability" because it is an independent policy "that would prevent relief even if the court were to render a favorable decision" to the Landlords. *Doe v. Virginia Dep't of State Police*, 713 F.3d 745, 756 (4th Cir. 2013). The Landlords must show that a favorable decision here is *likely* to redress their injuries. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs.*

[1] The parties agree that the Court should dismiss the Landlords' Takings claim under the Washington State Constitution. *See* ECF No. 37 at 14.

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(TOC), Inc., 528 U.S. 167, 181 (2000). They are unable to do so, because if the Moratorium was not in effect, the CDC moratorium would be—prohibiting the Landlords from evicting their non-paying tenants and blocking redress from this facet of the Moratorium. *See* CDC, *Temporary Halt in Residential Evictions to Prevent the Further Spread of COVID-19* (June 24, 2021), https://bit.ly/3gR7x2H (extending the CDC moratorium through July 31, 2021).

The Landlords argue that the CDC moratorium is currently not in effect, ECF No. 37 at 10–11, but this is flatly wrong. The four courts that have decided against the CDC moratorium have stayed or circumscribed their orders such that the CDC moratorium would still be in effect in Washington State if the Moratorium is enjoined or not in effect. *See Ala. Ass'n of Realtors v. U.S. Dep't of Health & Hum. Servs.*, No. 21-5093, 2021 WL 2221646, at *1 (D.C. Cir. June 2, 2021) (denying motion to vacate the district court's order staying its vacatur order pending appeal); *Skyworks, Ltd. v. Centers for Disease Control & Prevention*, No. 5:20-CV-2407, 2021 WL 2228676, at *14 (N.D. Ohio June 3, 2021) (clarifying that the declaratory judgment the court entered "binds the parties and their members" and declining the plaintiffs' invitation to expand the scope of the judgment more broadly); *Tiger Lily, LLC v. U.S. Dep't of Hous. & Urban Dev.*, No. 2:20-CV-02692-MSN-atc, 2021 WL 1171887, at *10 (W.D. Tenn. Mar. 15, 2021), *den'g stay pending appeal*, 992 F.3d 518 (6th Cir. 2021) (determining the CDC moratorium was "unenforceable in the Western District of Tennessee" only); *Terkel v. CDC*, No. 6:20-CV-00564, 2021 WL 742877, at *2 (E.D. Tex. Feb. 25, 2021) (declining to issue an injunction); *see*

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also ECF No. 36-1, Ex. L (DOJ news release explaining that the *Terkel* decision "does not extend beyond the particular plaintiffs"); *Chambless Enters., LLC v. Redfield*, No. 3:20-CV-01455, 2020 WL 7588849 (W.D. La. Dec. 22, 2020) (CDC moratorium did not exceed statutory authority of the CDC); *Brown v. Azar*, No. 1:20-CV-03702-JPB, 2020 WL 6364310 (N.D. Ga. Oct. 29, 2020) (same).

The Landlords also argue that the court in *Heights Apartments* determined that the CDC moratorium was narrower in some respects, when compared to the Minnesota moratorium at issue in that case. *See* 2020 WL 7828818, at *5. The plaintiffs in *Heights Apartments*, however, also alleged that they wanted to evict several tenants for other lease violations—which would be allowed under the CDC moratorium but was not allowed under the Minnesota moratorium. *See id.* By contrast, the Landlords here do not provide evidence that their tenants are violating lease provisions—other than the nonpayment of rent—and thus would not be protected by the CDC moratorium. *See* ECF Nos. 23, 24, 25, 37-1, 37-2. It remains the Landlords' burden—not the State's—to explain why the CDC moratorium poses no obstacle to their abilities to evict tenants for nonpayment. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("Since [the elements of standing] are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation."). The Landlords relatedly contend their tenants have not submitted specific declarations to qualify for the CDC moratorium.

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But their tenants are not required to submit these declarations yet, because the CDC moratorium would only take effect *if* the Court enjoined the State's Moratorium.

The Landlords additionally assert that they have standing to challenge the Moratorium's prohibition on treating unpaid rent "as an enforceable debt or obligation that is owing or collectable." Wash. Office of the Governor, Proclamation 20-19.6 (Mar. 18, 2021) (ECF No. 33-1 at 75–84). But this prohibition is not absolute; it does not apply to property owners who offer their tenants a reasonable repayment plan and whose tenants refuse or fail to comply with that plan. The Landlords have not taken the first step in attempting to collect unpaid rent from their tenants by offering them a reasonable repayment plan. *See* ECF No. 37-2 at 5–6 (form letter sent by Plaintiff Jevons); ECF No. 36-1 at 209 (rent demand letter sent by the Glenn Plaintiffs). Because the Landlords have left that remedy unpursued and its sufficiency untested, they lack standing to challenge that aspect of the Moratorium as well—especially as grounds for a separate challenge to the prohibition on evictions for unpaid rent. *See Davis v. FEC*, 554 U.S. 724, 734 (2008) (a plaintiff must demonstrate standing for each claim "he seeks to press and for each form of relief that is sought").

2. The Moratorium is set to expire on June 30, 2021

The Moratorium under Proclamation 20-19.6 will end on June 30, 2021. *See* Engrossed Second Substitute S.B. 5160, 67th Leg., Reg. Sess. (Wash. 2021), *enacted as* 2021 Wash. Sess. Laws, ch. 115. Some requirements under E2SSB 5160 will not be fully operationalized by July 1, 2021. *See, e.g.*, Second Sepe Decl., Ex. P (letter

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from bill's sponsor describing implementation of appointing counsel for tenants). The Office of the Governor will institute interim, bridge measures between when Proclamation 20-19.6 ends and E2SSB 5160—buoyed by hundreds of millions of federal rental assistance dollars—is operationalized. *See* Wash. Gov. Jay Inslee, Press Release, *Inslee announces eviction moratorium "bridge"* (June 24, 2021), https://bit.ly/3qmdPKQ. Such measures differ from Proclamation 20-19.6, relieving some current restrictions and providing a pathway for implementing E2SSB 5160. But the bridge proclamation and final details have yet to be released. When it is, counsel for the State will re-evaluate whether its mootness argument can be continued in good faith and will provide a Notice of Supplemental Authority. Based on the current status of the Moratorium and what is known about the bridge plan at the time of this filing, the State respectfully reserves its mootness argument.

3. The Governor has immunity under the Eleventh Amendment

The Landlords ignore precedent on the lack of federal jurisdiction over acts of state officials who have a "generalized duty to enforce state law" but do not have a "fairly direct" connection to enforcement of those laws. *L.A. Cnty. Bar Ass'n v. Eu*, 979 F.2d 697, 704 (9th Cir. 1992). They cite the Governor's duty to "see that the laws are faithfully executed." Wash. Const. art. III, § 5. But this is exactly the type of generalized duty that federal courts routinely reject as insufficient under *Ex parte Young*, 209 U.S. 123, 157 (1908). *See, e.g.*, *Doyle v. Hogan*, No. 19-2064, 2021 WL 2424800, at *3 (4th Cir. June 15, 2021); *Ass'n des Eleveurs de Canards et d'Oies du Quebec v. Harris*, 729 F.3d 937, 943 (9th Cir. 2013). Based on the Governor's

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lack of enforcement power, several courts within this district have dismissed the Governor from lawsuits challenging his proclamations—including the Moratorium. *See El Papel*, 2020 WL 8024348, at *6; *Faust v. Inslee*, No. C20-5356, 2020 WL 4816147, at *1 (W.D. Wash. Aug. 19, 2020); *MacEwen v. Inslee*, No. C20-5423 BHS, 2020 WL 4261323, at *2 (W.D. Wash. July 24, 2020). This Court should too.

The Landlords quote two Washington Supreme Court cases to argue that the Governor has enforcement power over the Moratorium, but both provide general propositions about the functions of the judiciary and the executive: "As the final right to determine the true intent and purpose of all laws is lodged in the Supreme Court of this state, so is the final determination as to their enforcement and execution lodged in the Governor." *Reiter v. Wallgren*, 184 P.2d 571, 576 (Wash. 1947) (quoting *State v. Clausen*, 264 P. 403, 405 (Wash. 1928)). And neither case is useful here. They do not address when an individual is able to sue an officer in federal court under *Ex parte Young* or the Governor's power to specifically enforce his proclamations. *See Reiter*, 184 P.2d at 576 (requiring taxpayer make a demand on the attorney general to bring suit against another state agency or else show futility); *State v. Clausen*, 264 P. at 405 (explaining the governor's superior authority to bring an action where the attorney general and governor disagree on the course of action).

B. The Moratorium Does Not Violate the Takings Clause

The Landlords' Takings claim has several fatal defects: First, the Moratorium does not effect a physical taking because the Landlords are not suffering permanent physical invasion of their properties. Second, the State has not directly appropriated,

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even temporarily, the Landlords' properties. Third, the State has not taken contract rights or security deposits. And finally, the Landlords cannot obtain equitable relief under this claim.

1. The Moratorium does not effect a physical taking

The State merely forecloses for a period of time a particular remedy—eviction—in certain circumstances for nonpayment of rent; this is not a physical taking.[2] "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land." *Yee v. City of Escondido, Cal.*, 503 U.S. 519, 527 (1992); *see also Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324 (2002) (physical takings are "relatively rare"). In contrast to such a compelled physical occupation, "[s]tates have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular without paying compensation for all economic injuries that such regulation entails." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 440 (1982). Here, the Moratorium merely regulates the landlord-tenant relationship and does not subject the Landlords to a "permanent physical occupation" of their properties. *Id.* at 434.

The Landlords invoked only *one* takings test to argue that the Moratorium is a

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[2] *See also Heights Apts.*, 2020 WL 7828818, at *14; *Baptiste*, 490 F. Supp. 3d at 388–90; *Auracle Homes*, 478 F. Supp. 3d at 220–21; *Elmsford Apt. Assocs.*, 469 F. Supp. 3d at 164.

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physical taking, *see* ECF No. 22 at 6, ECF No. 27 ¶ 60, but chides the State for pointing out that their cited regulatory takings cases do not apply, *see* ECF No. 37 at 16. To the extent the Landlords now argue that the Moratorium is both a physical taking and regulatory taking, ECF No. 37 at 16, the Court should reject it. For one, the Landlords did not make distinct (or any) arguments that the Moratorium is a regulatory taking in their summary judgment motion, so they have waived it. *McKay v. Ingleson*, 558 F.3d 888, 891 n.5 (9th Cir. 2009). For another, the Landlords still do not clearly argue that the Moratorium is a categorical taking—where the Landlords have been denied *all* economically beneficial use of land. *See Tahoe-Sierra*, 535 U.S. at 330. Nor could they. The Landlords "still enjoy many economic benefits of ownership[,]" as they "continue to accept rental payments from tenants not facing financial hardship[.]" *Elmsford Apt. Assocs.*, 469 F. Supp. 3d at 164. The Landlords likewise do not analyze the factors from *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), to argue that the Moratorium is a non-categorical regulatory taking. *See id.* at 165–168 (applying the *Penn Central* factors to hold that New York's moratorium was not a regulatory taking).

The Landlords argue that their ability to rent their properties is conditioned on forfeiting the rights to compensation for a physical occupation. ECF No. 37 at 15 (citing *Loretto*, 458 U.S. at 459 n.17). But this is a serious misreading of the Moratorium. Nothing in Proclamation 20-19.6 diminishes the tenant's responsibility to pay the entire amount of rent due and owing under the lease; the Moratorium does not diminish the tenant's rental obligation by even a penny. The Landlords can later

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seek to collect all that they are owed when the Moratorium is lifted (under E2SSB) or seek it now (following the requirements of Procl. 20-19.6). The argument also ignores that tenants and landlords may access rental assistance funds.

The Landlords' attempt to distinguish this case from *Yee* remain unpersuasive. In *Yee*, the Supreme Court held that a rent control ordinance did not constitute a taking. Though the Court did not expressly hold that the ordinance, working in conjunction with a state statute, prohibited eviction, the Court certainly considered the petitioners' arguments that there was indeed a prohibition on evictions—with a carve-out (similar to the Moratorium's) for changes of use after notice. *See Yee*, 503 U.S. at 527–28. Even then, because "[p]etitioners' tenants were invited by petitioners, not forced upon them by the government," they had not been subjected to a compelled physical invasion of their property; therefore, no physical taking had occurred. *Id.* at 528. As in *Yee*, the Moratorium does not compel the Landlords to rent their properties. Instead, the Landlords voluntarily chose to rent to their tenants. And the Landlords' assertion that some tenants have continued to physically occupy their properties, ECF No. 37 at 16, is like the claim rejected in *Yee*, where the mobile park owners similarly argued they could not evict their tenants. *Id.* at 526–27 ("Because under the California Mobilehome Residency Law the park owner cannot evict a mobile home owner or easily convert the property to other uses, the argument goes, the mobile home owner is effectively a perpetual tenant of the park . . . .").

The Moratorium merely regulates the Landlords' "*use* of their land by regulating the relationship between landlord and tenant[,]" and is thus not a physical

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taking. *Id.* at 528; *see also Tahoe-Sierra*, 535 U.S. at 322–23 (explaining that a government regulation that merely prohibited landlords from evicting tenants to pay a higher rent in *Block v. Hirsh*, 256 U.S. 135 (1921), was not a categorical taking); *F.C.C. v. Fla. Power Corp.*, 480 U.S. 245, 252 (1987) ("statutes regulating the economic relations of landlords and tenants are not *per se* takings").

Although "[a] different case would be presented were the statute, on its face or as applied, to compel a landowner over objection to rent his property or to refrain in perpetuity from terminating a tenancy[,]" *Yee*, 503 U.S. at 528, that is not the case here. The Landlords "invited" and "voluntarily rented" their units to renters. *Id.* at 527–28. The Moratorium will not continue in perpetuity, and it allows the Landlords to "change the use" of their land, for example, by selling or occupying the property themselves. *Id.* at 528; *see* Procl. 20-19.6 (requiring 60-day notice for sale or re-occupation). The Moratorium also permits the Landlords to evict or terminate a tenancy if the action "is necessary to respond to a significant and immediate risk to the health, safety, or property of others created by the resident." Procl. 20-19.6.

Cwynar v. City and County of San Francisco, 90 Cal. App. 4th 637 (2001), a non-precedential California case, does not support the Landlords. That case involved a takings challenge to an ordinance restricting property owners from evicting tenants to allow the owners to use the properties as a residence for themselves or their family. The court held that the plaintiffs should have been permitted to amend their complaint to present allegations that the ordinance "effectuate[d] life-time tenancies which effectively extinguish[ed] plaintiffs' right to occupy . . . their property." *Id.* at 655.

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Such a holding is compatible with *Yee*, which acknowledged that a physical taking may occur where the statute compels a landlord "to refrain in perpetuity from terminating a tenancy." *Yee*, 503 U.S. at 528. But lifetime tenancies are not being compelled here.

The Moratorium is a temporary regulation of the landlord-tenant relationship; it does not authorize a compelled physical invasion of property.

2. The State has not taken physical possession of the Landlords' properties, not even temporarily

The Landlords mistakenly rely on cases where the government has temporarily occupied property to make their argument that "a temporary taking of property . . . requires payment of just compensation." ECF No. 37 at 19. The State agrees that the government must compensate a property owner when "*the government occupies* the property for its own purposes, even though that use is temporary." *Tahoe-Sierra*, 535 U.S. at 322 (emphasis added). But here, the State itself is not occupying the Landlords' properties. Therefore, the cases the Landlords rely on do not support their argument.

Kimball Laundry Co. v. United States, 338 U.S. 1 (1949), *United States v. Petty Motor Co.*, 327 U.S. 372 (1946), and *United States v. General Motors Corp.*, 323 U.S. 373 (1945), are cases where the federal government itself physically occupied buildings for temporary periods of time. *See Tahoe-Sierra*, 535 U.S. at 322 (citing *General Motors*, 323 U.S. 373, and *Petty Motor*, 327 U.S. 372, for the proposition that the government must compensate for its temporary occupation of property).

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None of those cases dealt with regulations between property owners and third-party tenants whom they had voluntarily invited to occupy the property; they were about the federal government's own appropriation and occupation of facilities.

Again, *Hendler v. United States*, 952 F.2d 1364 (Fed. Cir. 1991), is of no avail to the Landlords. The case dealt with the government's physical intrusion on private property through concrete wells it installed, giving rise to a *per se* taking under *Loretto. Id.* at 1377. Here, by contrast, the State has not installed anything on or otherwise appropriated the Landlords' properties for its own use.

The Landlords again return to *Arkansas Game & Fish Commission v. United States*, 568 U.S. 23 (2012), to argue that a temporary occupation can trigger takings liability. But this reliance is misplaced. The Court in *Arkansas Game & Fish Commission* held "simply and only, that government-induced flooding temporary in duration gains no automatic exemption from Takings Clause inspection." 568 U.S. at 38. The Court then proceeded to apply a multi-factor test for government-created flooding different from the general regulatory-taking analysis under *Penn Central Transportation Co.*, 438 U.S. at 124 (1978). *See id.* at 38–40. "[I]ntermittent flooding cases reveal [that] such temporary limitations are subject to a more complex balancing process to determine whether they are a taking. The rationale is evident: they do not absolutely dispossess the owner of his rights to use, and exclude others from, his property." *Loretto*, 458 U.S. at 436 n.12.

The State has not directly appropriated the Landlords' properties, even temporarily. No physical taking has occurred.

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3. The Moratorium does not "take" contract rights

Cases cited by the Landlords, including *Cienega Gardens v. United States*, 331 F.3d 1319 (Fed. Cir. 2003), and *Lynch v. United States*, 292 U.S. 571 (1934), are inapposite because the State is not a party to the lease agreements and has not inserted itself in place of one of the contracting parties so as to "take" the contracts.

"The government does not 'take' contract rights pertaining to a contract between two private parties simply by engaging in lawful action that affects the value of one of the parties' contract rights." *Palmyra Pac. Seafoods, L.L.C. v. United States*, 561 F.3d 1361, 1365 (Fed. Cir. 2009). To establish that the government took private contract rights, a plaintiff must demonstrate that the government "put itself in the shoes" of one of the parties and assumed "all the rights and advantages" of that party. *Id.* at 1365–66 (quoting *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 120 (1924)). It is insufficient for the plaintiff to merely allege that the government frustrated the rights of a party or took the subject matter of the contract that made performance impossible. *See Omnia Commercial Co., Inc. v. United States*, 261 U.S. 502, 511 (1923). Here, the Landlords do not show that the State replaced itself with one of the original contracting parties so that it took the contract for its own use as discussed in *Omnia*. Nor have the Landlords shown that the State has gone "too far," again not briefing the "ad, hoc, factual inquiry" required by *Penn Central*. *See Cienega Gardens*, 331 F.3d at 1337; ECF No. 22 at 11–12; ECF No. 36 at 19–20.

4. The Moratorium does not "take" security deposits

The State is not confiscating security deposits. Instead, the Moratorium

prohibits landlords from withholding from tenants any portion of a security deposit in order to collect unpaid rent. *See* Procl. 20-19.6. It modifies the scheme for how Landlords may use security deposits.[3]

Armstrong v. United States, 464 U.S. 40 (1960), does not assist the Landlords, where the federal government's "total destruction . . . of all value of [the] liens" amounted to a "taking." *Id.* at 48. Here, the State has not acquired any security deposit for itself. Nor has the State "for its own advantage destroyed the value of the [security deposits.]" *Id.* The Landlords remain able to apply security deposits for tenant other violations of the RTLA, subject to accounting requirements. *See* Wash. Rev. Code § 59.18.280. The Moratorium does not effect a taking of security deposits.

5. The Landlords are not entitled to equitable relief

Even if the Landlords could show that a taking has occurred—which they cannot—they would not be entitled to equitable relief. The Takings Clause only prohibits states from taking private property for public use "without just compensation," U.S. Const. amend. V, so "[e]quitable relief is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984); *see also*

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[3] Under Washington law, "[a] tenant's security deposit is the personal property of the tenant unless and until they breach their duties under the RLTA." *Silver v. Rudeen Mgmt. Co., Inc.*, 484 P.3d 1251, 1259 (Wash. 2021).

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In re Nat'l Sec. Agency Telecomm. Recs. Litig., 669 F.3d 928, 932 (9th Cir. 2011) (injunctive and declaratory relief for Takings claim not available where plaintiff could seek damages against the United States).

As explained by the *El Papel* court, if the Moratorium has effected a taking, the Landlords can be compensated by damages measured by unpaid rent and late fees. *See* 2020 WL 8024348, at *13. So the cases suggesting declaratory relief is available for potentially *uncompensable* damages do not apply here. *See, e.g.*, *Babbitt v. Youpee*, 519 U.S. 234 (1997) (alleged takings where compensation was unavailable); *Hodel v. Irving*, 481 U.S. 704 (1987) (same); *Duke Power Co. v. Carolina Env't Study Grp., Inc.*, 438 U.S. 59, 71 n.15 (1978) (adequate compensation not assured).

C. The Moratorium Comports with the Contracts Clause

The Moratorium does not violate the Contracts Clause: it does not substantially impair the Landlords' contractual rights and it also reasonably and appropriately advances "a significant and legitimate public purpose." *Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018); *see El Papel*, 2020 WL 8024348, at *9.[4]

1. The Moratorium does not substantially impair contractual relationships between the Landlords and their tenants

The Moratorium does not substantially impair the Landlords' contracts

[4] *See also Heights Apts.*, 2020 WL 7828818, at *12; *Apt. Ass'n of L.A. Cnty.*, 500 F. Supp. 3d at 1100; *Baptiste*, 490 F. Supp. 3d at 353; *HAPCO*, 482 F. Supp. 3d at 355–56; *Auracle Homes*, 478 F. Supp. 3d at 199; *Elmsford Apt. Assocs.*, 469 F. Supp. 3d at 172.

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because the Moratorium does not: (1) undermine the contractual bargain; (2) interfere with reasonable expectations; or (3) prevent the Landlords from safeguarding or reinstating their rights. *See Sveen*, 138 S. Ct. at 1822.

First, the Moratorium does not undermine the Landlords' contractual bargain with their tenants, because the mere *delay* in the right to exercise one type of statutory remedy does not materially alter the lease agreements. *See Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U.S. 398, 447–48 (1934) (upholding mortgage moratorium that extended mortgagor's redemption period for up to two years). The Moratorium does not eliminate or even reduce tenants' obligations to pay rent. Moreover, the Landlords can treat unpaid rent as an enforceable debt if a tenant was offered, and refused or failed to comply with, a reasonable repayment plan based on the individual financial, health, and other circumstances of that tenant. *See* Procl. 20-19.6. This is not a "blanket prohibition on treating unpaid rent as an enforceable debt." ECF No. 37 at 26. The Landlords still retain the ability to enforce the bargained-for terms of the rental contracts. *Elmsford Apt. Assocs*., 469 F. Supp. 3d at 172 ("The eviction moratorium does not eliminate the suite of contractual remedies available to the Plaintiffs; it merely postpones the date on which landlords may commence summary proceedings against their tenants.").

Nor does the Moratorium interfere with the Landlords' reasonable expectations given the regulatory scheme governing landlord-tenant relationships. "[T]he reasonableness of expectations depends, in part, on whether . . . action was foreseeable, and this, in turn, is affected by whether the relevant party operates in a

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heavily regulated industry." *Sullivan v. Nassau Cnty. Interim Fin. Auth.*, 959 F.3d 54, 64 (2d Cir. 2020). *Cf. Loretto*, 458 U.S. at 440 (1982) (affirming in the Takings context that "States have broad power to regulate housing conditions in general and the landlord-tenant relationship in particular . . ." and citing as examples fire regulations, a mortgage foreclosure moratorium, and rent control statutes as powers the states may exercise). Significantly, the State is not inserting itself into "a field it had never sought to regulate[.]" *Nw. Grocery Ass'n v. City of Seattle*, No. C21-0142-JCC, 2021 WL 1055994, at *8 (W.D. Wash. Mar. 18, 2021) (quoting *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 249 (1978)).

This pandemic has no precedent in the modern era, but residential leases have been heavily regulated for many years and temporary moratoria on evictions are nothing new. *See, e.g.*, *Block*, 256 U.S. at 153 (1921) (upholding law prohibiting eviction of holdover tenants); *SKS & Assocs. v. Dart*, 619 F.3d 674 (7th Cir. 2010) (eviction moratorium during certain winter conditions); Seattle Mun. Code 22.206.160.C.8 (defense to eviction if eviction would result in tenant vacating between December 1 and March 1). Such "past regulation puts industry participants on notice that they may face further government intervention in the future," *Elmsford Apartment Associates*, 469 F. Supp. 3d at 169, so the Moratorium does not substantially impair the Landlords' contract rights. *See also HAPCO*, 2020 WL 5095496, at *7 (upholding Philadelphia eviction moratorium because "residential leases have been heavily regulated for many years").

The third factor—whether the Landlords can safeguard or reinstate their

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rights—strongly supports the conclusion that the Moratorium does not substantially impair the Landlords' contractual relationship with their tenants. The Moratorium does not affect when rent is due and does not reduce or eliminate the rent obligation of any tenant. The Landlords can seek to collect all they are owed if they have offered their non-paying tenants a reasonable repayment plan that the tenants have refused or failed to comply with. *See* Procl. 20-19-6. There remain ways for the Landlords to safeguard or reinstate their rights, even while the Moratorium is in effect.

2. The Moratorium appropriately and reasonably advances a significant and legitimate public purpose

The Court need not reach this second step because the Moratorium does not substantially impair the Landlords' contractual rights. But should the Court reach the second prong of the Contracts Clause test, the Moratorium also passes muster because it is an "appropriate and reasonable way to advance a significant and legitimate public purpose." *Sveen*, 138 S. Ct. at 1822 (cleaned up). Where, as here, the State is not a party to the contracts at issue, "courts 'defer to legislative judgment as to the necessity and reasonableness of a particular measure.'" *Campanelli v. Allstate Life Ins. Co*., 322 F.3d 1086, 1098 (9th Cir. 2003) (quoting *Energy Rsrvs. Grp. v. Kansas Power & Light Co.*, 459 U.S. 400, 412–13 (1983)); *see also Baptiste*, 490 F. Supp. 3d at 386 n.10 (noting that where the government is not a party to the contract, there must have been a rational basis for the legislation that allegedly impairs contracts); *Blaisdell*, 290 U.S. at 447–48 ("Whether the legislation is wise or unwise as a matter of policy is a question with which [the Court is] not concerned.").

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The Landlords make no responding arguments to the State's significant and legitimate purpose behind the COVID-19 emergency measure. *See* ECF No. 37 at 34. The Moratorium's purposes—to "reduce economic hardship" of those "unable to pay rent as a result of the COVID-19 pandemic" and "promote public health and safety by reducing the progression of COVID-19 in Washington State," Procl. 20-19.6—are not just significant and legitimate, but compelling. And the Moratorium's provision limiting the treatment of unpaid rent as an enforceable debt helps prevent "soft" or "informal" evictions—that is, measures short of unlawful detainer actions that lead tenants to "self-evict" to avoid negative credit history, an adverse judgment, or other collateral consequences. ECF No. 32 ¶ 17.

The Landlords make cursory arguments about the manner in which the Moratorium achieves these significant and legitimate purposes. But there is no question that the Moratorium is appropriately and reasonably tailored to the emergency wrought by COVID-19. *See El Papel*, 2020 WL 8024348, at *12 (holding the Landlords were unlikely to show the Moratorium violated the Contracts Clause because it was "designed to address vital public interests during a national public crisis"). For one, the Moratorium does not eliminate or reduce rent obligations, so like in *Blaisdell*, their "indebtedness is not impaired[.]" *Blaisdell*, 290 U.S. at 447. Second, although the Moratorium generally prohibits landlords from treating unpaid rent "as an enforceable debt or obligation that is owing or collectable," that prohibition applies only when nonpayment was "a result of the COVID-19 outbreak and occurred on or after February 29, 2020." Procl. 20-19-6. That is, the Landlords

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can pursue actions other than eviction to collect unpaid rent that predates or is unrelated to the pandemic. Third, the Landlords can collect *any* unpaid rent if a tenant refuses or fails to comply with an offered "re-payment plan that was reasonable based on the individual financial, health, and other circumstances of that resident." *Id.* Fourth, the Moratorium does not foreclose *all* evictions. The Landlords are permitted to evict tenants if their tenants pose a significant risk to the health, safety, or property of others, or if the Landlords seek to personally occupy the premises as a primary resident (with timely notice) or sell the property (also with timely notice). *See* Procl. 20-19.6. Fifth, the Moratorium is "temporary in operation[]" and limited to this emergency. *Blaisdell*, 290 U.S. at 447. For all these reasons and more, the Moratorium is appropriately and reasonably tailored. It strikes a balance between property owners and tenants; it is "not for the mere advantage of particular individuals but for the protection of a basic interest of society[,]" that is, to prevent mass evictions and the spread of COVID-19. *Id.* at 445.

The Landlords continue to complain that the Moratorium does not impose a certification requirement like the CDC moratorium. ECF No. 37 at 34. The *El Papel* court has already rejected a similar argument. 2020 WL 8024348, at *10–11. The question is not whether alternatives might exist, but whether the governmental choice meets constitutional standards. The Landlords' policy prescription ignores the deference due to the Governor's judgment as to the Moratorium's reasonableness. *Energy Rsrvs. Grp.*, 459 U.S. at 412–13. It also ignores that the Moratorium need not be narrowly tailored or the least burdensome means to prevent the spread of COVID-

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19 and mitigate housing instability. *See El Papel*, 2020 WL 8024348, at *10 ("The law should be tailored to the emergency justifying its enactment—although it need not be a perfect fit.").

Finally, while the epidemiologic curve is trending down, the coronavirus pandemic is not over. As of June 21, 2021, data shows that 57.3% of the 12 and over population is fully vaccinated, and the vaccine is currently available only for those 12 years of age and older. *See* Wash. State Dep't of Health, COVID-19 Data Dashboard, https://www.doh.wa.gov/Emergencies/COVID19/DataDashboard (last visited June 24, 2021). Those at risk of eviction are disproportionately less likely to be vaccinated. *See* Jennifer Tolbert, et al., *Vaccination is Local: COVID-19 Vaccination Rates Vary by County and Key Characteristics*, Kaiser Family Found. (May 12, 2021), https://bit.ly/3xOKg7k (finding higher county uninsured and poverty rates associated with lower vaccination rates) (Second Sepe Decl., Ex. Q). A significant percentage of renter households who have fallen behind on rent have children, many of whom cannot get vaccinated yet. ECF No. 32-2, Ex. N (finding eviction risk disproportionately impacting renters with children). The State continues to encourage the public to take precautions, particularly those who are not yet vaccinated against COVID-19.

Undeniably, many Washingtonians continue to experience financial hardships due to the pandemic and that the State's economic and public health recovery is fragile. There remains a need for a temporary pause on evictions until E2SSB 5160, which provides tenant protections during and after the public health emergency, and

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perhaps rental assistance programs are fully operationalized.[5] Economic recovery takes time, and many tenants cannot pay full rent while the State carefully reopens. *See* ECF No. 32-1, Ex. N (up to 789,000 Washingtonians at risk of eviction without moratorium), Ex. Z (265,000 Washington state households have little to no confidence in ability to make next month's rent).

This Court should hold the Moratorium does not violate the Contracts Clause.

D. The Moratorium Does Not Violate Substantive Due Process

Contemporary precedent, ignored by the Landlords, is highly deferential to government actions in the face of substantive due process challenges and do not include an "unduly oppressive" inquiry. Instead, substantive due process is met by showing that a rational public purpose justifies the regulation. *See Pension Ben. Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717, 729 (1984) ("[L]egislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and that the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way.") (quoting *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 15 (1976)); *Kim v. United States*, 121 F.3d 1269, 1273 (9th Cir. 1997) ("Where a fundamental right is not implicated, as in this case, governmental action need only have a rational basis to be upheld against a substantive due process attack.").

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[5] *See also* Jason DeParle, *Federal Aid to Renters Moves Slowly, Leaving Many at Risk*, N.Y. Times (updated May 4, 2021), https://nyti.ms/35PYkl3.

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For the reasons the Moratorium furthers a significant and legitimate public purpose in an appropriate and reasonable way, *supra* pp. 19–23, the Moratorium is not irrational. *See Blaisdell*, 290 U.S. at 447–48; *HAPCO*, 482 F. Supp. 3d at 356.

The Landlords do not cite any case law that would hold their economic interests as fundamental rights, thus triggering heightened scrutiny. And for good reason. "Such a holding would propel [the Court] "back to what is referred to (usually deprecatingly) as 'the *Lochner* era.'" *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 721 (2010) (plurality opinion); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 545 (2005) (noting the Court has "long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation").[6]

Next, assuming that the void for vagueness doctrine applied, the Moratorium is not impermissibly vague. It gives courts flexibility; in evaluating whether a repayment plan was reasonable, courts look to the tenant's "financial, health, and other circumstances of that resident." Procl. 20-19.6. The Landlords contend that this

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[6] The Landlords' "unconstitutional conditions" argument does not support their due process claim either. *See Zepeda Rivas v. Jennings*, 845 F. App'x 530, 534 (9th Cir. 2021) (addressing unconstitutional conditions of *confinement* for civil immigration detainees); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) (whether development exaction violated the Takings clause); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (whether land use regulation violated the Takings clause).

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is an "impossible procedure," ECF No. 37 at 40, but courts are free to evaluate the behaviors of the tenant and landlord in evaluating whether the plan was reasonable. *Cf.* Second Sepe Decl., Ex. O at 41:7-11. The Moratorium is not vague, as considerations for reasonableness provide "fair notice" to the Landlords of what is expected. *F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239, 253 (2012).

Finally, because the Moratorium is not arbitrary, the Landlords are unable to pursue a substantive due process claim where other constitutional provisions provide an explicit textual source of constitutional protection. *See Graham v. Connor*, 490 U.S. 386, 395 (1989); *Albright v. Oliver*, 510 U.S. 266, 273 (1994) (four-Justice plurality), *id.* at 281 (Kennedy, J., concurring in judgment); *Stop the Beach Renourishment*, 560 U.S. at 721.

E. Plaintiffs Are Not Entitled to Declaratory Relief Under § 1983

Because the Landlords' claims under the Contracts, Takings, and Due Process Clauses fail as a matter of law, they are not entitled to relief under § 1983.

III. CONCLUSION

The COVID-19 pandemic has brought devastating public health and economic consequences, but the Moratorium has been a critical—and constitutional—tool to reduce the transmission of COVID-19 and housing instability. The Court should sustain the Moratorium, enter summary judgment in favor of the State, and dismiss the Landlords' claims with prejudice.

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DATED this 25th day of June, 2021.

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DECLARATION OF SERVICE

I hereby declare that on this day I caused the foregoing document to be electronically filed with the Clerk of the Court using the Court's CM/ECF System which will serve a copy of this document upon all counsel of record.

DATED this 25th day of June, 2021, at Tacoma, Washington.

s/ Cristina Sepe

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